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Constitutional Law

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

4. Contemporaneous or Long-Continued Construction

§ 90. Contemporaneous or long-continued constitutional construction, generally

[Topic Summary](#) [Correlation Table](#) [References](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law 607, 609

In questions of constitutional construction, as in the determination of the constitutionality of statutes, great weight has always been attached to a contemporaneous exposition of the meaning of fundamental law¹ not only where such interpretation is that of the courts² but also where it is that of other departments of government.³

"Contemporanea expositio est optima et fortissima in lege" is a maxim of the civil law resting on a foundation of solid reason.⁴ The doctrine has such prevalence that it is applicable, not only in the exposition of statutes but also in the interpretation of constitutions of governments.⁵ The presumption is that those who were the contemporaries of the makers of the constitution have claims to the deference of later tribunals because they had the best opportunities of informing themselves of the understanding of the framers and of the sense put upon the constitution by the people when it was adopted.⁶ Similarly, a construction which has been long accepted by the various agencies of government and by the people will usually be accepted as correct by the judiciary⁷ or will at least be given great weight⁸ or consideration⁹ unless it is manifestly contrary to the letter or spirit of the Constitution,¹⁰ and a court may take judicial notice of widespread opinion and general practices in the interpretation of constitutional provisions.¹¹ The general principle favoring contemporaneous construction is usually applied more cautiously to constitutions than to laws, the ability to change the law easily, by legislative action, giving more force to a construction in conformity to usage than is justified in the case of a constitutional provision which cannot be so readily altered.¹²

Under the general rule requiring that every part of a constitution be given effect,¹³ a contemporaneous construction placed upon a constitutional provision will not be permitted to overturn and negate a clear provision of the constitution in cases where the meaning of a clause in the instrument is capable of two interpretations.¹⁴ Contemporaneous construction is further limited by the principle of priority in time under which nonjudicial construction of a constitutional provision subsequent to a judicial construction by the courts is of no effect in ascertaining its meaning,¹⁵ and by the rule that contemporaneous construction can never be allowed to enlarge, restrict, or contradict the plain meaning of the text.¹⁶ In addition, habit and tradition are not in themselves an adequate answer to a constitutional challenge.¹⁷

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Footnotes

- 1 Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of State of Washington v. U.S., 279 U.S. 655, 49 S. Ct. 463, 73 L. Ed. 894, 64 A.L.R. 1434 (1929); *In re Great Outdoors Colorado Trust Fund*, 913 P.2d 533 (Colo. 1996); *Washington v. Meachum*, 238 Conn. 692, 680 A.2d 262 (1996).
- 2 *People v. District Court of Appeal*, 193 Cal. 19, 222 P. 353 (1924).
If a constitutional provision has received a settled judicial interpretation and is incorporated into a new constitution, it will be presumed to have been retained with knowledge of the previous construction and courts will be bound to adhere thereto. *Atlanta Independent School System v. Luns*, 266 Ga. 657, 469 S.E.2d 22, 108 Ed. Law Rep. 1297 (1996).
- 3 *City and County of San Francisco v. County of San Mateo*, 10 Cal. 4th 554, 41 Cal. Rptr. 2d 888, 896 P.2d 181 (1995).
As to legislative construction, see § 92.
As to executive and administrative construction, see § 94.
- 4 *Northwestern Mut. Life Ins. Co. v. Johnson*, 8 Cal. 2d 42, 63 P.2d 814 (1936).
- 5 *State Dept. of Civil Service v. Clark*, 15 N.J. 334, 104 A.2d 685 (1954).
- 6 *In re Interrogatory of Governor*, 162 Colo. 188, 425 P.2d 31 (1967); *Johnson v. Duke*, 180 Md. 434, 24 A.2d 304 (1942).
- 7 Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of State of Washington v. U.S., 279 U.S. 655, 49 S. Ct. 463, 73 L. Ed. 894, 64 A.L.R. 1434 (1929); *City and County of San Francisco v. County of San Mateo*, 10 Cal. 4th 554, 41 Cal. Rptr. 2d 888, 896 P.2d 181 (1995).
- 8 Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of State of Washington v. U.S., 279 U.S. 655, 49 S. Ct. 463, 73 L. Ed. 894, 64 A.L.R. 1434 (1929).
The construction of the Constitution which has been followed since the founding of our government is undoubtedly due the greatest respect. *Ex parte Quirin*, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942), order modified on other grounds, 63 S. Ct. 22 (1942).
As to long-continued acquiescence in construction of constitutional provisions, see § 91.
- 9 *Clark v. Pawlenty*, 755 N.W.2d 293 (Minn. 2008).
- 10 *Downes v. Bidwell*, 182 U.S. 244, 21 S. Ct. 770, 45 L. Ed. 1088 (1901).
- 11 *Schieffelin v. Hylan*, 236 N.Y. 254, 140 N.E. 689 (1923).
- 12 *Leighton v. Abell*, 225 Minn. 565, 31 N.W.2d 646 (1948).
- 13 § 66.
- 14 *Amos v. Moseley*, 74 Fla. 555, 77 So. 619 (1917); *Connors v. Jefferson County Fiscal Court*, 277 Ky. 23, 125 S.W.2d 206 (1938).
- 15 *State ex rel. Hudson v. Carter*, 1933 OK 588, 167 Okla. 32, 27 P.2d 617, 91 A.L.R. 1497 (1933).
- 16 *Johnson v. Duke*, 180 Md. 434, 24 A.2d 304 (1942); *Leighton v. Abell*, 225 Minn. 565, 31 N.W.2d 646 (1948).
- 17 *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).

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